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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

IBRAHIM ISMAIL, Plaintiff and Respondent, v. ALLAH MONTCHAK, Defendant and Appellant.	B284163 (Los Angeles County Super. Ct. No. BC646395)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed.

The Kernan Law Firm, Stephen M. Kernan, and R. Paul Katrinak for Defendant and Appellant.

Freeman & Associates, Peter C. Freeman, and Richard W. Freeman Jr. for Plaintiff and Respondent.

Ibrahim Ismail identifies himself as "an adult film performer" called Tony T. Since 2009, however, Ismail has been a director of "adult films" for a company called Brazzers. Ismail sued Allah Montchak, whose stage name is Nikki Benz. Montchak identifies herself as an actress in "the adult film industry" and has appeared in over 180 adult videos. Ismail claimed Montchak defamed him and intentionally caused him emotional distress by falsely tweeting he raped her during an adult video shoot. She has 862,000 Twitter followers. Montchak filed a special motion to strike under Code of Civil Procedure section 425.16. The trial court denied her anti-SLAPP motion. We affirm.

I

We summarize the factual record from trial court papers.

A

Ismail's first amended complaint accused Montchak of libel and intentional infliction of emotional distress, alleging as follows.

Brazzers wanted Ismail to direct adult videos and gave him a rulebook for his work. Brazzers proposed a video titled "Nikki Goes Nuts." The genre was to be "boy girl anal." Ismail discussed the plan with Montchak, who approved the concept and a proposed male actor. Ismail texted Brazzers "confirming the content would be fisting and use of a dog collar." He also texted a photo of "a box of toys and BDSM gear" for Montchak to choose from during the scene.

On December 16, 2016, Ismail directed a different video titled "Fifty Shades of Brazzers" in which Montchak "acted as the aggressive, dominant figure." "[T]hat shoot went satisfactorily."

The next day, December 17, 2016, Ismail filmed the "Nikki Goes Nuts" video. Montchak "chose the toys and masks" to be used. The filming, however, stopped several times. Once was when the male actor noticed Montchak's "discomfort." "The second 'cut'

occurred during a breast slapping sequence." Montchak called "stop" and everyone took a rest.

Ismail alleged this shoot complied with Brazzers's rules, but afterwards Montchak falsely tweeted Tony T. had raped her during it. Her false tweets harmed Ismail.

B

Montchak filed a special motion to strike in response to Ismail's first amended complaint, supported by four declarations.

The first declaration was from Lauren Johnson, who was not at the shoot.

The second declaration was from Montchak's lawyer, who lacked personal knowledge but who appended to her declaration a news article and screenshots from an internet website.

The third declaration was from Montchak, who stated as follows. Beginning in April 2016, Montchak became an exclusive performer and brand ambassador for a pornographic production company called Brazzers. Ismail directed Montchak in a December 16, 2016 shoot, which went according to plan.

The next day, on December 17, 2016, Ismail directed Montchak in a different shoot. Montchak did not know the title of this second shoot. No one gave her the script. All Montchak knew was she was supposed to wear a business suit. Contrary to industry practice, Ismail cleared the room except for three people: Montchak, Ismail, and a male actor named Ramon. Ismail told Montchak to wear a mask. Montchak was gagged.

During the shoot Ismail "grabbed my head and forced me to open my eyes with his hands. Repeatedly, [Ismail] slapped my face, saying 'open your eyes bitch' and 'open your fucking eyes.' He would film with one hand and choke me with the other hand." Montchak never consented to Ismail's touch.

Ismail filmed an exit interview of Montchak in which, when asked if she would do that shoot again, Montchak said no. Ismail yelled "Fuck Nikki, you can't say that" and made her record the exit interview over to give a "yes" response before he would hand over her check. This shoot traumatized Montchak.

The fourth declaration was from Alex Torre a.k.a. VooDoo, who had no personal knowledge of the shoot.

Montchak also requested judicial notice, which the trial court denied.

C

Ismail opposed Montchak's motion with filings that included declarations.

Ismail's own declaration stated the following. He discussed the shoot in question with Montchak in advance. "Rough sex, choking, anal sex, toys, and masks were all discussed." In a second conversation, Ismail and Montchak "discussed some of the costuming, that a gag or mask would be used, and that I would be participating, meaning that two males would be involved although only [the male actor Ramon] would have sexual contact with her. We discussed the specific sexual acts that would be involved including choking, slapping, hair pulling, fisting, and spitting. The scene was initially designated . . . as 'crazy wild sex' and I described that to [Montchak]. I encouraged [Montchak] to break out of her shell and to push her limits. I recall that [Montchak] agreed and said she had always wanted to wear a mask during sex."

During the shoot, Ismail put his hands on Montchak's throat, "as we had discussed I would, to simulate choking. She was not actually being choked, as I had my hand on her throat but applied no pressure with my hand. The 'choking' was done for theatrical reasons and was consistent with the genre of the scene."

Montchak later falsely tweeted about Ismail, causing him to lose work and to suffer distress.

D

For purposes of this appeal, Montchak's string of Twitter publications appear to have included the following:

December 19, 2016: "I guess rape scene[s] are in now huh?"

December 19, 2016: "I'll go on CNN and tell the truth. I have zero to hide."

December 19, 2016: "I guess when I'm signing out and I tell you I'm not ok with the scene, you make me say I'm ok so I get paid."

December 20, 2016: "[T]he director himself put his hands on me and was choking me. . . never in a million years did I think @Brazzers would allow it."

December 20, 2016: "Hey @Brazzers [emoji] It's not good [illegible] she's so upset[.] They really fucked up this isn't over with her they're so fucked[.] I've never seen her this upset and we have been friends for over 10 years. She can't eat, her hand is black and blue, she still has a headache from getting . . . stomped on, and y'all director actually choking her himself ?????? If that happened to me I would have punched him in the face that is wrong on so many levels[.]"

December 20, 2016: "A lil more for you @Brazzers Wait what? Tony choked her? Why[?] Yes he did several times this is after she got her head stomped on who does that? And Nikki kept yelling cut and they kept going. This is just so upsetting to even me like how anyone could do that. It's not [further text not visible]."

December 20, 2016: "I'm trying my best to enjoy my birthday trip with my girls. I'm disgusted, traumatized, upset with @Brazzers and Tony T. I'm overseas but. . . [.]"

December 20, 2016: "Once I'm back in L.A., I will properly handle my business. No girl should have to go through what I went through on @Brazzers set."

December 20, 2016: "#NoMeansNo #CutMeansCut and me telling you I'm not ok with any of this should be taken seriously. I should not be beat down."

December 20, 2016: "In my 13 years in porn, this was the first time I went into shock on set & cried. #Brazzers."

December 20, 2016: "@nikkibenz Calls Out Brazzers For Being Assaulted On Set."

December 20, 2016 retweet of photo of Ismail.

December 20, 2016: "More about Tony T and @Brazzers I heart u. Thank you for your support. I'm standing up for myself, and every girl who's afraid to speak up. This needs to end. Porn should be fun not violent. Sick."

December 20, 2016 retweet from AVN Magazine: "Nikki Benz Alleges Being 'Traumatized' on Brazzers Set; Brazzers Responds."

December 21, 2016: "Please don't let @Brazzers PR stunt fool you. They have yet to apologize to me. They may think letting Tony T go will make me silent, but no."

December 21, 2016: "Ramon, Tony T and everyone on that set is guilty of letting this violent behavior happen for the sake of their paycheck. @Brazzers"

June 5, 2017 pinned tweet: "On set bullying, rape, & violence should never happen. #NoMeansNo on camera, off camera. Just NO!"

E

The trial court denied Montchak's special motion to strike. It sustained some of Ismail's objections to Montchak's evidence, overruled others, and denied Montchak's request for judicial notice.

The court overruled her evidentiary objections. Montchak appeals the trial court's denial of her special motion to strike.

II

The trial court properly denied Montchak's special motion to strike.

A

We describe pertinent law.

We independently review the grant or denial of a special motion to strike. (*Sweetwater Union High School District v. Gilbane Bldg. Co.* (2019) 6 Cal.5th 931, 940 (*Sweetwater*).) The parties agree the trial court ruled correctly on step one, so this appeal involves only the second step of the customary two-step analysis for a special motion to strike.

This second step is a summary-judgment-like procedure. (*Sweetwater*, *supra*, 6 Cal.5th at p. 940.) We first determine whether Ismail's prima facie showing is enough to win a favorable judgment. (*Ibid.*) This threshold is "not high." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 458.) Claims with minimal merit proceed. (*Sweetwater*, at p. 940.) We accept Ismail's evidence as true and do not weigh evidence or resolve conflicting factual claims. (*Ibid.*) We may consider affidavits, declarations, and their equivalents if it is reasonably possible these statements will be admissible at trial. (*Id.* at p. 949.)

After examining Ismail's evidence, we evaluate Montchak's showing only to determine if it defeats Ismail's claim as a matter of law. (*Sweetwater*, *supra*, 6 Cal.5th at p. 940.) Montchak can prevail either by establishing a defense or the absence of a necessary element. (*1–800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585.)

B

The factual record poses two problems.

The first problem is that the record contains Montchak's Twitter tweets, retweets, and pinned tweets. But what are tweets, retweets, and pinned tweets, exactly? The record does not say. (Compare *People v. Stamps* (2016) 3 Cal.App.5th 988, 996–997 & fn. 6 & 7 [internet data presumptively is unreliable and inadmissible] with *People v. Espinoza* (2018) 23 Cal.App.5th 317, 320–322 [proper foundations can make some internet evidence admissible under some circumstances].) A court cannot judicially notice how Twitter works. Facts of generalized knowledge cannot be judicially noticed unless they are so *universally* known they cannot reasonably be disputed. (See Evid. Code § 451, subd. (f).) That excludes Twitter.

The second problem is uncertainty about the complete string of Montchak's Twitter postings. When interpreting text, the whole context can be key. To achieve a reasonable interpretation, individual words and sentences often must be interpreted in light of a larger text. A standard example is the following pair of sentences: "Enjoy the feel of real mink. Buy a Von Pelt coat today." (Craswell, *Interpreting Deceptive Advertising* (1985) 65 B.U. L.Rev. 658, 669.) Neither sentence literally states "Von Pelt's coats are real mink," but the context of the whole makes this interpretation reasonable. One would not attempt to interpret Hamlet's character from one line in the play.

So exactly what did Montchak publish via Twitter, and when did she publish it? Much of this record is elliptical. In the trial court, both parties included attachments to declarations and provided only partial and unexplained screenshots and the like. Ambiguity surrounds the precise content and chronology of Montchak's statements. We have a Twitter case with no explanation of how Twitter works and Twitter excerpts without a reliably complete Twitter string.

This record thus in some respects is delphic. We proceed on the standard presumption that the trial court ruled correctly. We affirm unless the appellant demonstrates error. Specifically, we assume for purposes of this opinion that Montchak's tweets, retweets, and pinned tweets are statements that Montchak's Twitter audience correctly attributed to her.

C

The trial court rightly denied Montchak's special motion to strike. We treat Ismail's two claims in turn.

1

On his defamation claim, Ismail successfully established a prima facie case of libel per se. Accusing someone of rape is defamatory per se because rape is a serious and shocking felony. (See 5 Witkin, Summary of Cal. Law (11th ed. 2018) Torts, § 639, pp. 879–880 [collecting cases].) Libel is defamation via published statements. The elements of libel per se are:

1. Montchak made statements to people other than Ismail;

2. This audience reasonably understood the statements were about Ismail;

3. This audience reasonably interpreted the statements to mean Montchak was accusing Ismail of having raped her;

4. Montchak's accusation was false;

5. Montchak knew the accusation was false or had serious doubts about its truth; and

6. Ismail thereby suffered injury. (Cf. Civ. Code, § 45, subd. (a) [no need to prove special damages when the case involves a libel on its face, which is when the libel is defamatory without the necessity of explanatory matter]; CACI No. 1700.)

Ismail's prima facie evidence satisfied these six elements.

First we will analyze each element. Then we will examine the appellate arguments Montchak raises against the trial court ruling, which we affirm.

On elements one and two, Ismail had Montchak's admission that she had 862,000 Twitter followers and that she had tweeted about Tony T. This satisfied the first two elements.

Element three is the crux of this matter: whether Montchak's string of Twitter posts truly accused Ismail of raping her. As a matter of law, the string was reasonably susceptible of this interpretation. The ultimate question of interpretation is for the finder of fact at trial, but Ismail's prima facie showing on this record satisfied element three for purposes of defeating the special motion to strike. (Cf. *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [explaining interpretive roles of court and jury].)

The trial court took particular note of the tweet that "on set bullying, rape, and violence should never happen," and concluded Ismail had made a prima facie showing that Montchak had falsely accused Ismail of a crime.

As a matter of law, one reasonable interpretation of this record is that Montchak's tweets did accuse Tony T. of raping her. Taking the string as a whole, the objective reader understands Montchak was angrily complaining about how one key person treated her. The tweets name Tony T. five times and include his photograph. No other person draws this focus. The tweets mention "rape" twice. A reasonable interpretation is Montchak was using Twitter to accuse Tony T. of raping her.

This interpretation is not the only possible one, but it is enough to satisfy element three. Montchak's statement can be reasonably interpreted as stating facts accusing Ismail of criminal conduct. (See *Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486.)

Montchak's self-serving declaration about how to interpret her tweets cannot control. To the trial court, Montchak's declaration asserted she had *not* posted that Tony T. had raped her. But the Twitter feed must govern because Montchak gave her 862,000 Twitter followers access to that feed and not to her declaration.

Element four asks whether Montchak's accusation was false. That is, did Ismail establish a prima facie case that Montchak's rape allegation was untrue? We accept Ismail's evidence as true and do not weigh evidence or resolve conflicting factual claims. (*Sweetwater*, *supra*, 6 Cal.5th at p. 940.) Ismail swore he did not rape Montchak. That is a prima facie showing Montchak's accusation is false: there was no rape. Moreover, Montchak never declared Ismail raped her, although she swore Ismail abused her in other ways. At this procedural stage, the proof thus was consistent that there was no rape. Ismail satisfied element four.

Element five is whether Montchak knew her rape accusation was false, or had serious doubts about its truth. Ismail established element five. His prima facie case was that he and Montchak both were eyewitnesses to their interaction, which involved no sexual intercourse between them. The import, according to Ismail's version of events, is Montchak knew her charge of rape against him was false because she knew Ismail had not raped her because she knew the two had no sexual intecourse. Under *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 280, this is actual malice, which satisfies element five and moots the issue of whether Ismail was some sort of public figure.

Element six concerns Ismail's damages. Ismail swore Montchak's tweets damaged his career and put him out of work. This prima facie showing sufficed. (Cf. *Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 367 [slander falling in the

first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages].)

In short, the trial court correctly ruled Ismail had satisfied his prima facie burden, thus meaning the trial court had to deny Montchak's special motion to strike the defamation claim.

Now we examine the appellate arguments Montchak levels against this result.

Montchak argues, first, that her statements were substantially true. This argument simply reformulates her erroneous claim that her accusations did not include rape. But a reasonable and objective reader indeed could interpret her accusations this way, as we have seen.

Ismail's showing of actual malice means we need not address whether Montchak discharged her burden of establishing Ismail was a public figure of some sort. (Cf. 1 Sack on Defamation (5th ed. 2017) § 5:4.1, p. 5–74 [defendants have burden of persuasion]; Smolla, Law of Defamation (2d ed. 2018) § 2:118, p. 2–200 [defendant should bear this burden].)

Montchak argues her tweets were privileged under the "common" or "mutual" interest privilege of Civil Code section 47, subdivision (c). But Ismail demonstrated malice as a prima facie matter, which negates this privilege. (E.g., *Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203–1204.)

Montchak incorrectly asserts her tweets were mere expressions of opinion. Whether someone is a rapist is a question of fact and not opinion because a charge of rape is capable of decisive proof. (Cf. *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 [the dispositive question is whether a reasonable fact finder could conclude the published statements imply a provably false factual assertion].)

Montchak also argues Ismail failed to establish a prima facie case because he presented only conclusory statements about damages. This argument fails for two reasons. First, when Ismail proved libel per se, damage to his reputation is conclusively presumed and he did not need to introduce evidence of actual damages. (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 382.) Second, Ismail declared he had been unable to find regular work and had suffered other specific injuries because of these published statements.

In sum, Ismail defeated Montchak's special motion to strike his defamation claim.

2

On his cause of action for intentional infliction of emotional distress, Ismail also made a prima facie showing of a winning case.

On the record from this motion, Ismail had to make a prima facie case that Montchak's conduct was outrageous; that she intended to cause Ismail emotional distress; that Ismail suffered severe emotional distress; and that Montchak's conduct was a substantial factor in causing Ismail's severe emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051; CACI No. 1600.)

A false accusation of rape can be considered extreme and outrageous conduct. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1614 [the trial court initially determines whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery].) A trier of fact could conclude Montchak published this accusation with the intent of causing Ismail severe emotional distress. Finally, in Ismail's declaration, Ismail stated he has in fact suffered emotional distress because Montchak's Twitter postings made him distraught, depressed, anxious, worried, and frantic. Ismail claimed loss of work, focus,

sleep, and appetite. This evidence is sufficient to permit the finder of fact to evaluate it at trial. (See *Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 397 [the court determines whether severe emotional distress could be found; the jury determines whether the evidence reveals emotional distress that is severe].)

In short, Ismail met his burden on his intentional infliction of emotional distress claim. The trial court properly denied Montchak's special motion to strike this claim.

Montchak also asks us to take judicial notice of dozens of pages of irrelevant legislative history, internet material, and news articles. This motion is denied.

DISPOSITION

The judgment is affirmed. Ismail is entitled to costs.

WILEY, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.